

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SHIKEB SADDOZAI,
Plaintiff,

v.

CARLOS BOLANOS, et al.,
Defendants.

Case No. 18-04511 BLF (PR)

**ORDER OF DISMISSAL WITH
LEAVE TO AMEND; DENYING
MOTION FOR APPOINTMENT OF
COUNSEL**

(Docket No. 3)

Plaintiff, a state prisoner, filed the instant *pro se* civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff's motion for leave to proceed *in forma pauperis* will be addressed in a separate order.

DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune

1 from such relief. *See id.* § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally
2 construed. *See Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988).

3 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
4 elements: (1) that a right secured by the Constitution or laws of the United States was
5 violated, and (2) that the alleged violation was committed by a person acting under the
6 color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

7 **B. Plaintiff’s Claims**

8 Plaintiff claims generally that Correctional Health Services (“CHS”), which is
9 responsible for the healthcare of inmates within San Mateo County, has denied and
10 blocked treatment for his hand which was damaged from a gun shot wound. (Compl. at 3.)
11 Plaintiff claims that doctors at San Francisco General Hospital, where he was originally
12 treated, ordered a follow-up “to schedule treatment for surgery with a hand specialist” but
13 that CHS has failed to follow these orders since February 11, 2016, when he filed an
14 inmate grievance on the matter. (*Id.* at 5.) Plaintiff claims that this continual delay in
15 treatment amounts to deliberate indifference to medical needs, (*id.*) which is a cognizable
16 claim under § 1983. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *McGuckin v. Smith*,
17 974 F.2d 1050, 1059 (9th Cir. 1992). However, Plaintiff fails to allege sufficient facts to
18 state a claim against the named defendants. Specifically, Plaintiff names Sheriff Carlos
19 Bolanos and Captain Scott Kirkpatrick as defendants but makes no mention of them or
20 provides any description of their specific actions in complaint’s statement of claim section.
21 (Compl. at 2.) Plaintiff shall be granted an opportunity to file an amended complaint to
22 attempt to state a claim against these defendants that are supported by sufficient facts.

23 In preparing an amended complaint, Plaintiff must keep the following principles in
24 mind. Liability may be imposed on an individual defendant under § 1983 only if Plaintiff
25 can show that the defendant proximately caused the deprivation of a federally protected
26 right. *See Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988); *Harris v. City of Roseburg*,
27 664 F.2d 1121, 1125 (9th Cir. 1981). A person deprives another of a constitutional right
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1 within the meaning of section 1983 if he does an affirmative act, participates in another's
2 affirmative act or omits to perform an act which he is legally required to do, that causes the
3 deprivation of which the plaintiff complains. *See Leer*, 844 F.2d at 633. Under no
4 circumstances is there respondeat superior liability under section 1983. Or, in layman's
5 terms, under no circumstances is there liability under section 1983 solely because one is
6 responsible for the actions or omissions of another. *See Taylor v. List*, 880 F.2d 1040,
7 1045 (9th Cir. 1989).

8 Plaintiff also fails to state a claim against the CHS. Local governments are
9 "persons" subject to liability under 42 U.S.C. § 1983 where official policy or custom
10 causes a constitutional tort, *see Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690 (1978);
11 however, a city or county may not be held vicariously liable for the unconstitutional acts of
12 its employees under the theory of respondeat superior, *see Board of Cty. Comm'rs. of*
13 *Bryan Cty. v. Brown*, 520 U.S. 397, 403 (1997); *Monell*, 436 U.S. at 691; *Fuller v. City of*
14 *Oakland*, 47 F.3d 1522, 1534 (9th Cir. 1995). To impose municipal liability under § 1983
15 for a violation of constitutional rights resulting from governmental inaction or omission, a
16 plaintiff must show: "(1) that he possessed a constitutional right of which he or she was
17 deprived; (2) that the municipality had a policy; (3) that this policy amounts to deliberate
18 indifference to the plaintiff's constitutional rights; and (4) that the policy is the moving
19 force behind the constitutional violation." *Oviatt By and Through Waugh v. Pearce*, 954
20 F.2d 1470, 1474 (9th Cir. 1992) (quoting *City of Canton v. Harris*, 489 U.S. 378, 389
21 (1989) (internal quotation marks omitted). Plaintiff fails to allege sufficient facts to state a
22 *Monell* claim against CHS because he makes no allegation of any policy or claims that a
23 policy was the moving force behind the violation of Plaintiff's Eighth Amendment rights.
24 He may attempt to do so in the amended complaint.

25 **C. Motion for Appointment of Counsel**

26 Plaintiff has filed a motion for appointment of counsel based on indigence, the
27 complexity of the issues, limited access to library and knowledge of the law, and that he
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would be better served by the assistance of counsel should this matter go to trial. (Docket No. 3.) However, there is no constitutional right to counsel in a civil case unless an indigent litigant may lose his physical liberty if he loses the litigation. *See Lassiter v. Dep't of Social Services*, 452 U.S. 18, 25 (1981); *Rand v. Rowland*, 113 F.3d 1520, 1525 (9th Cir. 1997) (no constitutional right to counsel in § 1983 action), *withdrawn in part on other grounds on reh'g en banc*, 154 F.3d 952 (9th Cir. 1998) (en banc). The decision to request counsel to represent an indigent litigant under § 1915 is within “the sound discretion of the trial court and is granted only in exceptional circumstances.” *Franklin v. Murphy*, 745 F.2d 1221, 1236 (9th Cir. 1984). Plaintiff’s asserted grounds do not establish exceptional circumstances. Accordingly, the motion is **DENIED** for lack of exceptional circumstances. *See Agyeman v. Corrections Corp. of America*, 390 F.3d 1101, 1103 (9th Cir. 2004); *Rand*, 113 F.3d at 1525 (9th Cir. 1997); *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991); *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986). This denial is without prejudice to the Court’s *sua sponte* appointment of counsel at a future date should the circumstances of this case warrant such appointment.

CONCLUSION

For the foregoing reasons, the Court orders as follows:

The complaint is **DISMISSED with leave to amend**. Within **twenty-eight (28) days** of the date this order is filed, Plaintiff shall file an amended complaint to correct the deficiencies described above. The amended complaint must include the caption and civil case number used in this order, Case No. C 18-04511 BLF (PR), and the words “AMENDED COMPLAINT” on the first page. If using the court form complaint, Plaintiff must answer all the questions on the form in order for the action to proceed.

The amended complaint supersedes the original, the latter being treated thereafter as non-existent. *Ramirez v. Cty. of San Bernardino*, 806 F.3d 1002, 1008 (9th Cir. 2015). Consequently, claims not included in an amended complaint are no longer claims and

1 defendants not named in an amended complaint are no longer defendants. *See Ferdik v.*
2 *Bonzelet*, 963 F.2d 1258, 1262 (9th Cir.1992).

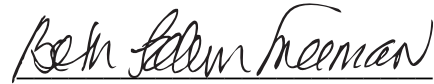
3 **Failure to respond in accordance with this order in the time provided will**
4 **result in the dismissal of this action without prejudice and without further notice to**
5 **Plaintiff.**

6 The Clerk shall include two copies of the court's complaint with a copy of this
7 order to Plaintiff.

8 This order terminates Docket No. 3.

9 **IT IS SO ORDERED.**

10 **Dated:** December 10, 2018



BETH LABSON FREEMAN
United States District Judge